

\*E-Filed 9/29/10\*

1 WILLARD K. TOM  
 General Counsel

2

3 LISA D. ROSENTHAL, Bar # 179486  
 KERRY O'BRIEN, Bar # 149264  
 EVAN ROSE, Bar # 253478  
 4 ERIC EDMONDSON, D.C. Bar # 450294  
 Federal Trade Commission  
 5 901 Market Street, Ste. 570  
 San Francisco, CA 94103  
 6 (415) 848-5100 (voice)  
 (415) 848-5184 (fax)  
 7 lrosenthal@ftc.gov  
 kobrien@ftc.gov  
 8 erose@ftc.gov  
 eedmondson@ftc.gov  
 9

10 Attorneys for Plaintiff  
 Federal Trade Commission

11

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN JOSE DIVISION

15

16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 SWISH MARKETING, INC., a corporation,

20 MARK BENNING, individually and as an  
 21 officer of SWISH MARKETING, INC.,

22 MATTHEW PATTERSON, individually and  
 23 as an officer of SWISH MARKETING, INC.,  
 and

24 JASON STROBER, individually and as an  
 25 officer of SWISH MARKETING, INC.,

26 Defendants.

Case No. C09-03814 RS

~~PROPOSED~~ STIPULATED  
 FINAL JUDGMENT AND ORDER  
 FOR PERMANENT INJUNCTION  
 AND OTHER EQUITABLE  
 RELIEF AS TO DEFENDANT  
 JASON STROBER

27

28

Stipulated Final Judgment and Order - C09-03814 RS

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), has filed a First  
2 Amended Complaint for Injunctive and Other Equitable Relief (“Complaint”) against the  
3 defendants in this matter pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act  
4 (“FTC Act”), 15 U.S.C. §§ 45(a), 53(b). The FTC and Defendant Jason Strober (“Defendant”),  
5 by and through his counsel, have agreed to settlement of this action without adjudication of any  
6 issue of fact or law, and without Defendant admitting any of the non-jurisdictional facts alleged  
7 in the Complaint or liability for any of the violations alleged in the Complaint. To resolve all  
8 matters of dispute between them in this action, the FTC and Defendant hereby stipulate to the  
9 entry of, and request the Court to enter, this Stipulated Final Judgment and Order for Permanent  
10 Injunction and Other Equitable Relief (“Order”).

11 **IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:**

12 1. This Court has jurisdiction over the subject matter of this case and jurisdiction  
13 over all parties pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and  
14 1345;

15 2. Venue in the Northern District of California is proper under 15 U.S.C. § 53(b) and  
16 28 U.S.C. § 1391(b) and (c);

17 3. The acts and practices of Defendant were and are in or affecting commerce, as  
18 defined in Section 4 of the FTC Act, 15 U.S.C. § 44;

19 4. The Complaint states a claim upon which relief can be granted under Section 5(a)  
20 of the FTC Act, 15 U.S.C. § 45(a), and the Commission has the authority to seek the relief it has  
21 requested;

22 5. Defendant has entered into this Order freely and without coercion, and Defendant  
23 acknowledges that he has read the provisions of this Order and is prepared to abide by them;

24 6. The undersigned, individually and by and through their counsel, have agreed that  
25 the entry of this Order resolves all matters of dispute between them arising from the Complaint  
26 in this action, up to the date of entry of this Order;

27 7. Defendant waives all rights to seek judicial review or otherwise challenge or  
28 contest the validity of this Order. Defendant also waives any claims that he may have held under

1 the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to  
2 the date of this Order;

3 8. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are  
4 binding upon Defendant, and his officers, agents, servants, employees, attorneys, and all other  
5 persons or entities in active concert or participation with him, who receive actual notice of this  
6 Order by personal service or otherwise;

7 9. This Order is remedial in nature and shall not be deemed or construed as a fine,  
8 damages, penalty, or punitive assessment;

9 10. Each party shall bear its own costs and attorneys' fees; and

10 11. Entry of this Order is in the public interest.

### 11 **ORDER**

#### 12 **DEFINITIONS**

13 For purposes of this Order, the following definitions shall apply:

14 A. **“Billing information”** means any data that enables any person to access a consumer's  
15 account, including but not limited to a credit card, checking, savings, share or similar  
16 account, utility bill, mortgage loan account, or debit card.

17 B. **“Clearly and conspicuously”** means:

18 1. In textual communications (e.g., printed publications or words displayed on the  
19 screen of an electronic device), the disclosure shall be of a type size and location  
20 sufficiently noticeable for an ordinary consumer to read and comprehend the  
21 disclosure, in print that contrasts with the background on which it appears;

22 2. In communications disseminated orally or through audible means (e.g., radio or  
23 streaming audio), the disclosure shall be delivered in a volume and cadence  
24 sufficient for an ordinary consumer to hear and comprehend the disclosure;

25 3. In communications disseminated through video means (e.g., television or  
26 streaming video), the disclosure shall be in writing in a form consistent with  
27 Subsection 1 of this definition and shall appear on the screen for a duration  
28 sufficient for an ordinary consumer to read and comprehend the disclosure;

- 1           4.     In communications made through interactive media such as the Internet, online  
2           services, and software:
- 3           a.     The disclosure shall be unavoidable and presented in a form consistent  
4           with Subsection 1 of this definition in addition to any audio or video  
5           presentation of them; and
- 6           b.     “*In close proximity*” shall mean on the same webpage, online service  
7           page, or other electronic page, and proximate to the triggering  
8           representation, and shall not be accessed or displayed through hyperlinks,  
9           pop-ups, interstitials, or other means;
- 10          5.     In communications that contain both audio and visual portions, the disclosure  
11          shall be presented simultaneously in both the audio and visual portions of the  
12          communication. *Provided however*, that in any communication disseminated  
13          solely through visual or audio means, the disclosure may be made through the  
14          same means in which the communication is presented.
- 15          6.     In all instances, the disclosure shall be presented prior to the consumer incurring  
16          any financial obligation, in an understandable language and syntax, and with  
17          nothing contrary to, inconsistent with, or in mitigation of the disclosures used in  
18          any communication with the consumer.
- 19    C.     “**Defendant**” means Jason Strober.
- 20    D.     “**Individual Defendants**” means Mark Benning, Matthew Patterson, and Jason Strober.
- 21    E.     “**Marketing Affiliate**” means any third party with which Defendant, or any business for  
22          which Defendant is a majority owner, officer, or director, or which Defendant directly or  
23          indirectly controls, has an agreement under which:
- 24          1.     Defendant or such business agrees to pay a commission or other compensation to  
25          the Marketing Affiliate because the Marketing Affiliate has driven or referred  
26          customers or potential customers to Defendant or such business; or
- 27          2.     The Marketing Affiliate agrees to pay a commission or other compensation to  
28          Defendant or such business because Defendant or such business has driven or

1 referred customers or potential customers to the Marketing Affiliate.

2 *Provided* that, for purposes of this Order, a “Marketing Affiliate” is not a third party who  
3 merely displays banner ads, sponsored links, or other like advertisements that are created  
4 directly and solely by Defendant, or by any business for which Defendant is a majority  
5 owner, officer, or director.

6 F. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or  
7 services.

8 G. **“Payment Card”** means any card that is backed by an account that holds or can hold  
9 funds belonging to the cardholder, or offers credit to the cardholder, including but not  
10 limited to a prepaid card, credit card, or debit card.

11 H. **“Period of Inquiry”** means from September of 2006 through August of 2007.

12 I. **“Swish”** means Swish Marketing, Inc.

13 **I.**

14 **PROHIBITION AGAINST MAKING MISREPRESENTATIONS**

15 **IT IS ORDERED** that Defendant, and his officers, agents, servants, employees, and  
16 attorneys, and those persons in active concert or participation with him who receive actual notice  
17 of this Order by personal service or otherwise, whether acting directly or through any sole  
18 proprietorship, partnership, limited liability company, corporation, subsidiary, branch, division,  
19 Marketing Affiliate, or other entity, in connection with the advertising, promoting, offering for  
20 sale, or sale of any Payment Card, loan, any financial product or service, or any other product or  
21 service, are hereby permanently restrained and enjoined from:

- 22 A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication,
- 23 1. That such product or service is a bonus, free, a gift, or without cost;
- 24 2. The cost or price of such product or service;
- 25 3. The consequences of submitting an application for any such product or service;
- 26 4. The method by which a consumer will be assessed a fee, charge, debit, or bill; and
- 27 5. Any other material fact; and
- 28

1 B. Representing, in any manner, expressly or by implication, that such product or service is  
2 a bonus, free, a gift, or without cost, without disclosing clearly and conspicuously, and in  
3 close proximity to the representation, all material terms, conditions, and obligations  
4 relating to the receipt and retention of such product or service.

5 **II.**

6 **EXPRESS INFORMED CONSENT**

7 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,  
8 employees, and attorneys, and those persons in active concert or participation with him who  
9 receive actual notice of this Order by personal service or otherwise, whether acting directly or  
10 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,  
11 branch, division, Marketing Affiliate, or other entity, in connection with the advertising,  
12 promoting, offering for sale, or sale of any Payment Card, loan, any financial product or service,  
13 or any other product or service, are hereby enjoined from directly or indirectly using billing  
14 information to obtain payment from a consumer, unless, prior to using such billing information  
15 to obtain payment:

16 A. They request that the consumer indicate his or her assent to pay for the product or service  
17 using a specified account;

18 B. They disclose clearly and conspicuously and in close proximity to the request for the  
19 consumer's indication of assent the following information:

- 20 1. The specific billing information to be used;
- 21 2. The amount to be paid;
- 22 3. The method to be used to assess the payment;
- 23 4. The entity on whose behalf the payment will be assessed; and
- 24 5. All material restrictions, limitations, or conditions applicable to the purchase,  
25 receipt, or use of the product or service that is the subject of the offer; and

26 C. The consumer affirmatively indicates assent to pay for the product or service using the  
27 specified account. In connection with communications made through interactive media  
28 such as the Internet, online services, and software, the consumer must indicate such

1 assent by clicking on a button that is specifically labeled to convey such assent, or by  
2 taking substantially similar affirmative action authorizing the transaction.

3 **III.**

4 **MONITORING BY DEFENDANT**  
5 **OF HIS MARKETING AFFILIATES**  
6 **OR OTHER THIRD PARTIES**

7 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,  
8 employees, and attorneys, whether acting directly or through any sole proprietorship,  
9 partnership, limited liability company, corporation, subsidiary, branch, division, Marketing  
10 Affiliate, or other entity, in connection with the advertising, promoting, offering for sale, or sale  
11 of any Payment Card, loan, or any financial product or service, shall take reasonable steps  
12 sufficient to monitor and ensure that Defendant's Marketing Affiliates comply with the  
13 requirements of Sections I and II of this Order. Such steps shall include, at a minimum:

14 A. Prior to accepting any prospective Marketing Affiliate, Defendant shall:

- 15 1. Provide the Marketing Affiliate with a copy of this Order;
- 16 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in  
17 which the Marketing Affiliate:
  - 18 a. Acknowledges receipt of this Order;
  - 19 b. Expressly agrees to distribute a copy of the Order to the Marketing  
20 Affiliate's owners, managers, and division heads; and
  - 21 c. Expressly agrees to comply with the terms of Sections I and II; and
- 22 3. Provide written notice to such Marketing Affiliate that failing to comply with the  
23 terms of Sections I and II will result in immediate termination of Defendant's  
24 agreement with the Marketing Affiliate;

25 B. Within thirty (30) days of service of this Order upon Defendant, Defendant shall:

- 26 1. Provide any existing Marketing Affiliate with a copy of this Order;
- 27 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in  
28 which the Marketing Affiliate:
  - a. Acknowledges receipt of this Order;

- 1 b. Expressly agrees to distribute a copy of the Order to the Marketing  
2 Affiliate’s owners, managers, and division heads; and  
3 c. Expressly agrees to comply with the terms of Sections I and II; and  
4 3. Provide written notice to each existing Marketing Affiliate that failing to comply  
5 with the terms of Sections I and II will result in immediate termination of  
6 Defendant’s agreement with the Marketing Affiliate and the forfeiture of all  
7 monies earned or owed;

8 **Provided however**, that if Defendant terminates a Marketing Affiliate within thirty (30)  
9 days of service of this Order, Defendant shall not be required to satisfy the requirements  
10 of this Subsection with respect to any such terminated Marketing Affiliate; and

- 11 C. Defendant shall terminate, immediately, any Marketing Affiliate or other third party that  
12 Defendant reasonably concludes has engaged in or is engaging in acts or practices  
13 prohibited by this Order, whether directly or through another person or entity.

14 **Provided however**, that this Section does not authorize or require Defendant to take any action  
15 that violates any federal, state, or local law.

16 **IV.**

17 **CONSUMER RESTITUTION**

18 **IT IS FURTHER ORDERED** that:

- 19 A. Defendant and his counsel represent that, concurrently with their execution of this Order,  
20 Defendant has transferred the sum of eight-hundred fifty thousand dollars (\$850,000)  
21 (“Restitution Funds”) into an interest bearing trust account controlled by Baker &  
22 Hostetler LLP, which shall hold the entire sum for no purpose other than payment to the  
23 Commission after entry of this Order by the Court. Within five (5) days of receipt of  
24 notice of the entry of this Order, Defendant’s counsel shall transfer the Restitution Funds,  
25 not including accrued interest, to the Commission in the form of an electronic funds  
26 transfer. **Provided however that**, upon notice that either the FTC or the Court has  
27 rejected acceptance or entry of this Order, Baker & Hostetler LLP will be relieved of its  
28 duties regarding the Restitution Funds and may distribute them as directed by Defendant.



1 B. All funds paid to or received by the Commission pursuant to this Order shall be deposited  
2 into a fund administered by the Commission or its agent to be used for equitable relief,  
3 including consumer redress and any attendant expenses for the administration of any  
4 redress fund. In the event that direct redress to consumers is wholly or partially  
5 impracticable or funds remain after redress is completed, the Commission may apply any  
6 remaining funds for such other equitable relief (including consumer information  
7 remedies) as it determines to be reasonably related to Defendant's practices as alleged in  
8 the Complaint. Any funds not used for such equitable relief will be deposited with the  
9 United States Treasury as disgorgement. Defendant shall have no right to challenge the  
10 Commission's choice of remedies under this Section. Defendant shall have no right to  
11 contest the manner of distribution chosen by the Commission.

12 C. Subject to Subsection IV.A, Defendant relinquishes all dominion, control, and title to the  
13 funds paid to the fullest extent permitted by law. Defendant shall make no claim to or  
14 demand return of the funds, directly or indirectly, through counsel or otherwise.

15 D. Defendant agrees that the facts as alleged in the Complaint filed in this action shall be  
16 taken as true without further proof in any bankruptcy case or subsequent civil litigation  
17 pursued by the Commission to enforce its rights to any payment or money judgment  
18 pursuant to this Order, including but not limited to a nondischargeability complaint in  
19 any bankruptcy case. Defendant further stipulates and agrees that the facts alleged in the  
20 Complaint establish all elements necessary to sustain an action by the Commission  
21 pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and  
22 that this Order shall have collateral estoppel effect for such purposes.

23 **V.**

24 **MONETARY JUDGMENT AND COOPERATION WITH FTC**

25 **IT IS FURTHER ORDERED** that:

26 A. In addition to the payment of consumer restitution paid by Defendant pursuant to Section  
27 IV above, judgment in the amount of three hundred fifty thousand dollars (\$350,000) is  
28 hereby entered against Defendant as equitable monetary relief, in favor of the

1 Commission. *Provided however*, that this judgment shall be suspended until further  
2 order of the Court pursuant to this Section.

3 B. If, upon motion by the Commission to the Court, the Court finds that Defendant failed to  
4 comply fully with Section V, the suspension of judgment shall be lifted and the Court  
5 may order that the judgment amount, plus interest from the entry date of this Order,  
6 pursuant to 28 U.S.C. § 1961, shall be immediately due and payable by Defendant.

7 *Provided however*, that in all other respects, this Order shall remain in full force and  
8 effect, unless otherwise ordered by the Court.

9 C. If no motion pursuant to Subsection V.B has been filed or is pending as of the time of  
10 final resolution of this matter, as defined below, the FTC shall file a satisfaction of  
11 judgment in favor of Defendant as to the suspended judgment described in this Section in  
12 the form shown on Attachment A to this Stipulated Order within thirty (30) days of such  
13 final resolution of this matter. A final resolution of this matter occurs:

- 14 1. After all appellate rights have been exhausted; or
- 15 2. Upon the entry of a final stipulated judgment or judgments that resolve all matters  
16 of dispute between the FTC and all remaining defendants arising from the  
17 Complaint, in which the remaining defendants have waived all rights of judicial  
18 review.

19 D. Defendant, in connection with this action and any subsequent FTC investigations related  
20 to or associated with the transactions or the occurrences that are the subject of the FTC's  
21 Complaint, until such time as a satisfaction of judgment in favor of the Defendant as to  
22 the suspended judgment described in this Section is filed with the Court, shall cooperate  
23 in good faith with the FTC, including its attorneys, employees, consultants, and experts,  
24 to the full extent of his abilities and personal knowledge. Upon request by the FTC,  
25 Defendant shall:

- 26 1. Appear at such places within this Judicial District and times as the FTC shall  
27 request upon five (5) days written notice, or otherwise reasonably request, for  
28 interviews, conferences, pretrial discovery, review of documents, and for

1 otherwise providing cooperation consistent with this Section;

2 2. Upon five (5) days written notice, appear and provide truthful testimony in any  
3 trial, deposition, or other proceeding related to or associated with the transactions  
4 or the occurrences that are the subject of the Complaint, without the service of a  
5 subpoena; *provided* that for any such trial, deposition, or other FTC proceeding  
6 that occurs outside of this District, the Defendant shall be entitled to standard  
7 expenses pursuant to 28 U.S.C. § 1821, but shall appear without the service of a  
8 subpoena.

9 3. Cooperate with the FTC to prepare, and then sign under penalty of perjury, a  
10 truthful affidavit regarding:

11 a. Defendant's duties and responsibilities at Swish, as well as those of the  
12 other Individual Defendants;

13 b. Defendant's participation in the transactions or occurrences that are the  
14 subject of the Complaint, as well as such participation by the other  
15 Individual Defendants; and

16 c. Defendant's knowledge of the transactions or occurrences that are the  
17 subject of the Complaint, as well as such knowledge possessed by the  
18 other Individual Defendants;

19 4. With respect to documents and electronically stored information produced or  
20 generated in connection with this action:

21 a. Authenticate such documents and electronically stored information by  
22 testifying truthfully, where Defendant possesses personal knowledge of  
23 such facts, as to the place, date, creator, and circumstances of the creation  
24 of such documents and electronically stored information; and

25 b. Certify such documents and electronically stored information that  
26 constitute records of regularly conducted business activity by testifying  
27 truthfully, where Defendant is qualified to do so, that such records were  
28 made at or near the time of the occurrence of the matters set forth by (or

1 from information transmitted by) a person with knowledge of those  
2 matters, were kept in the course of the regularly conducted activity of  
3 Swish, and were made by the regularly conducted activity as a regular  
4 practice of Swish;

5 5. With respect to the creation and appearance of websites operated by Swish:

- 6 a. Assist the FTC, to the extent feasible to do so, in re-generating, and  
7 authenticating the appearance of, websites operated by Swish during the  
8 Period of Inquiry;
- 9 b. Describe the operation of Swish's servers during the Period of Inquiry,  
10 including the purposes of such servers, when such servers were online;  
11 and whether, and when, such servers were used in production, testing, or  
12 development;
- 13 c. Describe Swish's network topology during the Period of Inquiry;
- 14 d. Describe the manner in which consumers were referred to websites  
15 operated by Swish during the Period of Inquiry;
- 16 e. Describe the roles of Swish employees, including but not limited to the  
17 other Individual Defendants, in designing, programming, or otherwise  
18 changing the appearance of websites operated by Swish during the Period  
19 of Inquiry;
- 20 f. Describe Swish's bug-tracking and software development ticketing  
21 systems during the Period of Inquiry; and
- 22 g. Answer questions posed by the FTC related to the re-generation of or the  
23 authentication of the appearance of websites operated by Swish during the  
24 Period of Inquiry; and

25 6. With respect to conversion rates, or the rates at which consumers signed up for  
26 offers on websites operated by Swish:

- 27 a. Assist the FTC in calculating conversion rates for all products and  
28 services during the Period of Inquiry, including offers for all products and

1 services that at any point were defaulted to “Yes;”

- 2 b. Explain the meanings of the fields and values used in Swish’s databases  
3 during the Period of Inquiry and provide an entity relationship diagram or  
4 data dictionary for such databases;
- 5 c. Provide a logical data flow for Swish’s lead-generating and affiliate-  
6 marketing algorithms during the Period of Inquiry;
- 7 d. Describe the accounting mechanisms Swish used to track conversions and  
8 generate conversion rates; and
- 9 e. Answer questions posed by the FTC related to the calculation of the  
10 conversion rates.

11 **VI.**

12 **COMPLIANCE MONITORING**

13 **IT IS FURTHER ORDERED** that, for the purpose of monitoring and investigating  
14 compliance with any provision of this Order:

- 15 A. Within ten (10) days of receipt of written notice from a representative of the  
16 Commission, Defendant shall submit additional written reports, which are true and  
17 accurate and sworn to under penalty of perjury; produce documents for inspection and  
18 copying; appear for deposition; and provide entry during normal business hours to any  
19 business location in Defendant’s possession or direct or indirect control to inspect the  
20 business operation;
- 21 B. In addition, the Commission is authorized to use all other lawful means, including but not  
22 limited to:
- 23 1. Obtaining discovery from any person, without further leave of court, using the  
24 procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69;
- 25 2. Having its representatives pose as consumers and suppliers to Defendant, his  
26 employees, or any other entity managed or controlled in whole or in part by  
27 Defendant, without the necessity of identification or prior notice; and  
28

1 C. Defendant shall permit representatives of the Commission to interview any employer,  
2 consultant, independent contractor, representative, agent, or employee who has agreed to  
3 such an interview, relating in any way to any conduct subject to this Order. The person  
4 interviewed may have counsel present.

5 **Provided however**, that nothing in this Order shall limit the Commission's lawful use of  
6 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to  
7 obtain any documentary material, tangible things, testimony, or information relevant to unfair or  
8 deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C.  
9 § 45(a)(1)).

## 10 VII.

### 11 COMPLIANCE REPORTING

12 **IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this  
13 Order may be monitored:

14 A. For a period of five (5) years from the date of entry of this Order,

15 1. Defendant shall notify the Commission of the following:

16 a. Any changes in Defendant's residence, mailing addresses, and telephone  
17 numbers, within ten (10) days of the date of such change;

18 b. Any changes in Defendant's employment status (including  
19 self-employment), and any change in Defendant's ownership in any  
20 business entity, within ten (10) days of the date of such change. Such  
21 notice shall include the name and address of each business that Defendant  
22 is affiliated with, employed by, creates or forms, or performs services for;  
23 a detailed description of the nature of the business; and a detailed  
24 description of Defendant's duties and responsibilities in connection with  
25 the business or employment; and

26 c. Any changes in Defendant's name or use of any aliases or fictitious names  
27 within ten (10) days of the date of such change;  
28

1           2.     Defendant shall notify the Commission of any changes in structure of any  
2           business entity that Defendant directly or indirectly controls, or has an ownership  
3           interest in, that may affect compliance obligations arising under this Order,  
4           including but not limited to: incorporation or other organization; a dissolution,  
5           assignment, sale, merger, or other action; the creation or dissolution of a  
6           subsidiary, parent, or affiliate that engages in any acts or practices subject to this  
7           Order; or a change in the business name or address, at least thirty (30) days prior  
8           to such change, *provided* that, with respect to any such change in the business  
9           entity about which Defendant learns less than thirty (30) days prior to the date  
10          such action is to take place, Defendant shall notify the Commission as soon as is  
11          practicable after obtaining such knowledge.

12 B.     One hundred eighty (180) days after the date of entry of this Order and annually  
13          thereafter for a period of three (3) years, Defendant shall provide a written report to the  
14          FTC, which is true and accurate and sworn to under penalty of perjury, setting forth in  
15          detail the manner and form in which he has complied and is complying with this Order.  
16          This report shall include, but not be limited to:

- 17          1.     Defendant's then-current residence address, mailing addresses, and telephone  
18                  numbers;
- 19          2.     Defendant's then-current employment status (including self-employment),  
20                  including the name, addresses, and telephone numbers of each business that  
21                  Defendant is affiliated with, employed by, or performs services for; a detailed  
22                  description of the nature of the business; and a detailed description of Defendant's  
23                  duties and responsibilities in connection with the business or employment;
- 24          3.     A copy of each acknowledgment of receipt of this Order, obtained pursuant to the  
25                  Section titled "Distribution of Order;" and
- 26          4.     Any other changes required to be reported under Subsection A of this Section.

- 1 C. Defendant shall notify the Commission of the filing of a bankruptcy petition by  
2 Defendant within fifteen (15) days of filing.
- 3 D. For the purposes of this Order, Defendant shall, unless otherwise directed by the  
4 Commission's authorized representatives, send by overnight courier (not the U.S. Postal  
5 Service) all reports and notifications to the Commission that are required by this Order  
6 to:

7 Associate Director for Enforcement  
8 Federal Trade Commission  
9 600 Pennsylvania Avenue, N.W  
Washington, D.C. 20580  
RE: *FTC v. Swish Marketing, Inc., et al.*

- 10 **Provided** that, in lieu of overnight courier, Defendant may send such reports or  
11 notifications by first-class mail, but only if Defendant contemporaneously sends an  
12 electronic version of such report or notification to the Commission at: DEbrief@ftc.gov.
- 13 E. For purposes of the compliance reporting and monitoring required by this Order, the  
14 Commission shall communicate with Defendant through Defendant's counsel, Barry J.  
15 Cutler, Baker Hostetler LLP, 1050 Connecticut Avenue NW, Suite 1100, Washington,  
16 D.C. 20036, or Brian M. Grossman, Tesser & Ruttenberg, 12100 Wilshire Boulevard,  
17 Suite 220, Los Angeles, CA 90025. Should both such counsel cease representation of  
18 Defendant, the Commission may communicate directly with Defendant for such  
19 purposes.

## 20 VIII.

### 21 RECORD KEEPING PROVISIONS

22 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry  
23 of this Order, Defendant, for any business for which he is the majority owner or directly or  
24 indirectly controls, is hereby restrained and enjoined from failing to create and retain the  
25 following records:

- 26 A. Accounting records that reflect the cost of goods or services sold, revenues generated,  
27 and the disbursement of such revenues;



- 1 B. Personnel records accurately reflecting: the name, address, and telephone number of each  
2 person employed in any capacity by such business, including as an independent  
3 contractor; that person’s job title or position; the date upon which the person commenced  
4 work; and the date and reason for the person’s termination, if applicable;
- 5 C. Customer files containing the names, addresses, phone numbers, dollar amounts paid,  
6 quantity of items or services purchased, and description of items or services purchased, to  
7 the extent such information is obtained in the ordinary course of business;
- 8 D. Complaints and refund requests (whether received directly or indirectly, such as through  
9 a third party) and any responses to those complaints or requests;
- 10 E. Copies of all sales scripts, training materials, advertisements, or other marketing  
11 materials;
- 12 F. Documents sufficient to demonstrate the experience of consumers on each materially  
13 different version of each website on which Defendant, whether acting directly or through  
14 any sole proprietorship, partnership, limited liability company, corporation, subsidiary,  
15 branch, division, Marketing Affiliate, or other entity, advertise, promote, market, offer  
16 for sale, sell, or provide products or services, including, as necessary:
- 17 1. Screenshots or screen capture recordings of such websites;
  - 18 2. Source code, database records, or log files for such websites; and
  - 19 3. Other documents related to the design and functioning of such websites, including  
20 but not limited to feature descriptions, programmer documentation, developer’s  
21 guides, specification documents, and version histories; and
- 22 G. All records and documents necessary to demonstrate full compliance with each provision  
23 of this Order, including but not limited to, copies of acknowledgments of receipt of this  
24 Order required by the Sections titled “Distribution of Order” and “Acknowledgment of  
25 Receipt of Order” and all reports submitted to the FTC pursuant to the Section titled  
26 “Compliance Reporting.”
- 27 \\  
28 \\  
29

1 **IX.**

2 **DISTRIBUTION OF ORDER**

3 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry  
4 of this Order, Defendant shall deliver copies of the Order as directed below:

- 5 A. Defendant as Control Person: For any business that Defendant controls, directly or  
6 indirectly, or in which Defendant has a majority ownership interest, Defendant must  
7 deliver a copy of this Order to (1) all principals, officers, directors, and managers of that  
8 business; (2) all employees, agents, and representatives of that business who engage in  
9 conduct related to the subject matter of the Order; and (3) any business entity resulting  
10 from any change in structure set forth in Subsection A.2 of the Section titled  
11 “Compliance Reporting.” For current personnel, delivery shall be within five (5) days of  
12 service of this Order upon Defendant. For new personnel, delivery shall occur prior to  
13 them assuming their responsibilities. For any business entity resulting from any change  
14 in structure set forth in Subsection A.2 of the Section titled “Compliance Reporting,”  
15 delivery shall be at least ten (10) days prior to the change in structure.
- 16 B. Defendant as employee or non-control person: For any business for which Defendant is  
17 not a controlling person of a business but otherwise engages in conduct related to the  
18 subject matter of this Order, Defendant must deliver a copy of this Order to all principals  
19 and managers of such business before engaging in such conduct.
- 20 C. Defendant must secure a signed and dated statement acknowledging receipt of the Order,  
21 within thirty (30) days of delivery, from all persons receiving a copy of the Order  
22 pursuant to this Section.

23 **X.**

24 **ACKNOWLEDGMENT OF RECEIPT OF ORDER**

25 **IT IS FURTHER ORDERED** that Defendant, within five (5) business days of receipt of  
26 this Order as entered by the Court, must submit to the Commission a truthful sworn statement  
27 acknowledging receipt of this Order.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**XI.**

**RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

**IT IS SO ORDERED**, this 28th day of September, 2010.

  
RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE

1 **SO STIPULATED:**

2 WILLARD K. TOM  
3 General Counsel

4 JEFFREY A. KLURFELD  
5 Regional Director

6 \s\ Lisa D. Rosenthal

7 LISA D. ROSENTHAL  
8 KERRY O'BRIEN  
9 EVAN ROSE  
10 ERIC D. EDMONDSON  
11 Federal Trade Commission  
12 901 Market Street, Ste. 570  
13 San Francisco, CA 94103  
14 (415) 848-5150 (voice)  
15 (415) 848-5184 (fax)

16 Dated: September 27, 2010

17 ATTORNEYS FOR PLAINTIFF

\s\ Jason Strober

JASON STROBER

Dated: July 1, 2010

\s\ Barry J. Cutler

BARRY J. CUTLER  
Baker Hostetler, LLP  
1050 Connecticut Avenue NW  
Suite 1100  
Washington, D.C. 20036  
(202) 861-1572 (voice)  
(202) 861-1783 (fax)

Attorney for Defendant Jason Strober

Dated: July 1, 2010

\s\ Brian M. Grossman

BRIAN M. GROSSMAN  
Tesser & Ruttenberg  
12100 Wilshire Blvd., Suite 220  
Los Angeles, CA 90025  
(310) 207-4022 (voice)  
(310) 207-4033 (fax)

Attorney for Defendant Jason Strober

Dated: July 2, 2010

1 **SO STIPULATED:**

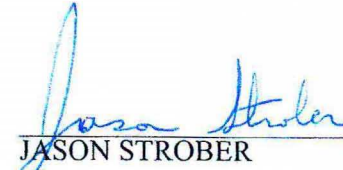
2 WILLARD K. TOM  
3 General Counsel

4 JEFFREY A. KLURFELD  
5 Regional Director

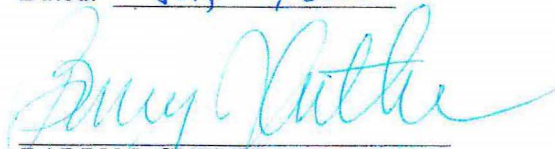
6  
7 LISA D. ROSENTHAL  
8 KERRY O'BRIEN  
9 EVAN ROSE  
10 ERIC D. EDMONDSON  
11 Federal Trade Commission  
12 901 Market Street, Ste. 570  
13 San Francisco, CA 94103  
14 (415) 848-5150 (voice)  
15 (415) 848-5184 (fax)

16 Dated: \_\_\_\_\_

17 ATTORNEYS FOR PLAINTIFF

  
\_\_\_\_\_  
JASON STROBER

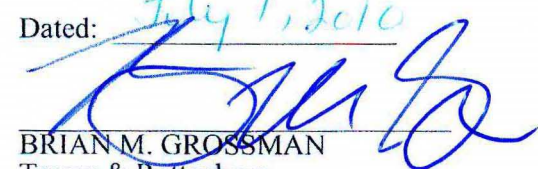
Dated: July 1, 2010



\_\_\_\_\_  
BARRY J. CUTLER  
Baker Hostetler, LLP  
1050 Connecticut Avenue NW  
Suite 1100  
Washington, D.C. 20036  
(202) 861-1572 (voice)  
(202) 861-1783 (fax)

Attorney for Defendant Jason Strober

Dated: July 1, 2010



\_\_\_\_\_  
BRIAN M. GROSSMAN  
Tesser & Ruffenberg  
12100 Wilshire Blvd., Suite 220  
Los Angeles, CA 90025  
(310) 207-4022 (voice)  
(310) 207-4033 (fax)

Attorney for Defendant Jason Strober

Dated: 7-2-10

Attachment A

WILLARD K. TOM  
General Counsel

LISA D. ROSENTHAL, Bar # 179486  
KERRY O'BRIEN, Bar # 149264  
EVAN ROSE, Bar # 253478  
ERIC EDMONDSON, D.C. Bar # 450294  
Federal Trade Commission  
901 Market Street, Ste. 570  
San Francisco, CA 94103  
(415) 848-5100 (voice)  
(415) 848-5184 (fax)  
lrosenthal@ftc.gov  
kobrien@ftc.gov  
erose@ftc.gov  
eedmondson@ftc.gov

Attorneys for Plaintiff  
Federal Trade Commission

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a corporation,

MARK BENNING, individually and as an  
officer of SWISH MARKETING, INC.,

MATTHEW PATTERSON, individually and  
as an officer of SWISH MARKETING, INC.,  
and

JASON STROBER, individually and as an  
officer of SWISH MARKETING, INC.,

Defendants.

Case No. C09-03814 RS

**SATISFACTION OF JUDGMENT  
AS TO DEFENDANT JASON  
STROBER**

On \_\_\_\_\_, the Court entered a Stipulated Final Judgment and Order for  
Permanent Injunction and Other Equitable Relief as to Defendant Jason Strober (Dkt. #121)

1 (“Final Order”). Pursuant to Subsection V.A of the Final Order, a judgment in the amount of  
2 \$350,000 was entered against Defendant Strober for equitable monetary relief. Subsection V.A  
3 further provided, however, that Defendant Strober’s liability for \$350,000 would be suspended  
4 upon the conditions specified in Section V.

5 Pursuant to Subsection V.C of the Final Order, Plaintiff hereby acknowledges that the  
6 judgment entered against Defendant Strober is satisfied.

7  
8 Respectfully submitted,

9  
10 DATED:

11 \_\_\_\_\_  
12 LISA D. ROSENTHAL  
13 KERRY O’BRIEN  
14 EVAN ROSE  
15 ERIC D. EDMONDSON  
16 Federal Trade Commission  
17 901 Market Street, Suite 570  
18 San Francisco, CA 94103  
19 (415) 848-5100 (phone)  
20 (415) 848-5184 (facsimile)

21 Attorneys for Plaintiff  
22 FEDERAL TRADE COMMISSION  
23  
24  
25  
26  
27  
28